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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next today in Case 10-218, PPL
5 Montana v. Montana.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice and may it
10 please the Court:

11 The State's claim to back rent here is truly
12 remarkable. When these dams were built back in the day,
13 PPL's predecessors, Petitioner's predecessors, secured
14 all the necessary property rights and easements. As
15 part of that process, particularly for the dams that
16 created reservoirs, there was an elaborate process of
17 getting flood easements and in many cases paying
18 substantial amounts of money. In that process, nothing
19 was hidden; it was open and notorious.

20 Indeed, the State assisted by lending the
21 utilities its eminent domain power to deal with
22 holdouts. But now, 100 years later, the State comes in
23 with a holdout claim of its own and suggests that it's
24 entitled to massive compensation based on the small
25 strip of riverbed that lies underneath these flooded

1 reservoirs and the dams. The Montana Supreme Court
2 allowed that claim to succeed to the tune of tens of
3 millions of dollars of back rent. Now it seems that --

4 JUSTICE KENNEDY: Well, is your point that
5 there should be a Federal rule of -- of laches or
6 estoppel, or are you just building up to the fact that
7 this is traditional, well recognized doctrine and
8 there's been -- and there's been a sudden change?

9 MR. CLEMENT: That's exactly where I was
10 going, Justice Kennedy. I was suggesting that the
11 Montana Supreme Court could only approve this result,
12 which clearly did unsettle settled expectations, by
13 deviating from well-settled principles of Federal
14 navigability law.

15 Now, the mistakes were a little bit
16 different for each of the rivers at issue. As to the
17 Clark Fork and the Upper Missouri, the critical error I
18 believe with the Montana Supreme Court decision was its
19 failure to focus on the river segments that are directly
20 at issue and instead focus on the river as a whole.
21 With the Madison the errors are different, because with
22 the Madison there is no evidence that any stretch of
23 that river was navigable at statehood.

24 So there the problem was principally that
25 the court relied on modern day evidence of recreational

1 use to substitute for true historic evidence of
2 commercial navigation at statehood.

3 JUSTICE ALITO: On the issue of whether we
4 should look to the segments or to the river as a whole,
5 what authorities can we consult? You rely heavily on
6 U.S. v. Utah, and that certainly is a relevant
7 precedent; but there is disagreement about what it means
8 and the only authority that I see that U.S. v. Utah
9 cited was The Montello, which seems to cite nothing
10 whatsoever. So where do we -- is that the end of the
11 trail? Is there anyplace else we can look?

12 MR. CLEMENT: Well, I -- I mean, it's close
13 to the end of the trail. I mean, you can go back to The
14 Daniel Ball, but that's not going to help you any more
15 than The Montello. I think, though, that the critical
16 cases really are Utah -- but I also think there are
17 other cases that this Court has had -- Oklahoma v. Texas
18 would be an example -- where this Court has looked as a
19 discernible segment of a river. Brewer-Elliott is
20 another one.

21 And I think the starting point for the
22 Court's analysis in every one of these cases has been to
23 look at the segment of the river that is at issue, that
24 has been put at issue. Now, if you have a sovereignty
25 battle between the State and the Federal Government, a

1 lot of times it's the segment of the river within the
2 State, or in Brewer-Elliott it was the segment of the
3 river adjacent to an Indian reservation.

4 JUSTICE ALITO: All of this, I take it,
5 derives from the rule that preexisted -- preexisted the
6 adoption of the Constitution, that the sovereign owned
7 the navigable rivers within its borders. Is there some
8 body of common law that addresses this, that would shed
9 some light on whether that means the whole river or it
10 means segments?

11 MR. CLEMENT: There really isn't,
12 Justice Alito, because we get our common law from
13 England. In England actually the common law was
14 different. At England, the navigable waters ended at
15 the ebb and flow of the tide, so every internal stream
16 within Great Britain was viewed as non-navigable and the
17 property belonged to the riparians.

18 JUSTICE ALITO: So what -- what is the
19 origin of the rule that the original 13 States owned the
20 navigable rivers or parts of the rivers, but not the
21 parts that weren't. That was some feature of American
22 colonial law?

23 MR. CLEMENT: Sure. I mean, it was -- it
24 was adopted as part of -- the sort of -- just the idea
25 of creating the sovereign republic of the United States.

1 We borrowed our common law. I think initially nobody
2 focused on these navigable segments.

3 And it's important to recognize that this
4 issue really doesn't even arise in the eastern United
5 States, because until about 1850 this idea that States
6 could own the river beds if they were non-navigable
7 never really occurred to anyone. So in most of the
8 eastern States as a matter of State law, whether a river
9 is navigable or non-navigable, the riparian owns to the
10 middle of the stream bed.

11 So after 1851 this Court recognizes -- makes
12 clear to the States that they actually have a choice,
13 and so the States that come into the Union after 1851,
14 many of them, including Montana, adopt the rule that,
15 well, unless these streams -- if these streams are
16 non-navigable, then we take the river stream. And so
17 that's where the question comes up.

18 So maybe the reason there isn't a great deal
19 of precedent on this is explained by the fact that this
20 is an issue that largely arises in the western United
21 States. But that's why I think it's such a mistake to
22 kind of look a gift horse in the mouth, so to speak, and
23 not focus on Utah, because Utah is a situation that
24 seems irreconcilable with the Montana Supreme Court
25 decision and the State's basic theory, because there the

1 special master and this Court recognized a non-navigable
2 segment right in the middle of two navigable portions of
3 stream.

4 JUSTICE SOTOMAYOR: Could you define "de
5 minimis" for me?

6 MR. CLEMENT: Well, I -- I'm -- I'm happy to
7 try, but I think -- I'm not going to give you --

8 JUSTICE SOTOMAYOR: If we can't, some
9 guidance or limit that we set for --

10 MR. CLEMENT: I've thought about this a lot,
11 Justice Sotomayor, and I'm not here to give you a sound
12 bite that's a bright-line definition of "de minimis." I
13 think de minimis almost by its nature takes its -- its
14 meaning from the context of the inquiry. But let me --
15 let me offer at least three guideposts that I think are
16 helpful.

17 One, as a practical matter I think this
18 Court can look to its own cases dealing with islands in
19 a navigable stream, and those cases are on page 17 of
20 the government's brief. And this Court's cases say if
21 there is a small island in a navigable stream, under an
22 acre, of negligible value, we basically ignore it.
23 Later cases, though, came along and dealt with islands
24 that were much larger, and the Court analyzed those
25 separately from the navigable stream, and said the

1 United States actually retains ownership to the larger
2 islands, and they don't go. So that's one place to
3 look.

4 The second place to look, I think, is also a
5 practical judgment based on the nature of the lawsuit.
6 And here the State itself has come in and identified
7 stretches of riverbed that they think are significant
8 enough to generate \$50 million in back rent. And I
9 think they, having identified those riverbed stretches
10 as being worth \$50 million, are hard pressed to then
11 turn around and say, oh, but they are de minimis, just
12 ignore them.

13 The third rule I would point to is that I
14 think topography has something of a role to play here.
15 If you look at the special master's report in Utah or
16 some of the other cases that have decided the point at
17 which the navigability stops, they pointed to features
18 of the river as defining a discernible segment like a
19 tributary coming in or the geology of the -- of the bed
20 over which the river runs, if it shifts from kind of a
21 silty loam to hard rock in a canyon, that's something
22 that you can point to.

23 JUSTICE SOTOMAYOR: I know you've told me
24 that you think Montello is not pertinent because it
25 involved a different issue. But assuming that it were

1 pertinent, because I'm not quite sure how its discussion
2 doesn't fit the needs here, one of the factors you
3 haven't mentioned in terms of de minimis is the portage
4 and its use with respect to commerce; and by that I
5 mean, it appears to me in Montello, what the Court was
6 saying was the history of use of this river showed that
7 these obstructions didn't stop the flow of commerce.

8 That what people did was -- it appeared some
9 extreme things. They got off -- they got their goods
10 off one boat, walked it a certain distance or drove it
11 by wagon another distance and then put it on another
12 boat or the same boat that they had lessened the load on
13 and moved it over. And so it doesn't talk about the
14 distance of that portage; it talks about the impact on
15 commerce.

16 MR. CLEMENT: Right.

17 JUSTICE SOTOMAYOR: So why isn't that a
18 factor in the de minimis issue?

19 MR. CLEMENT: Well, I mean --

20 JUSTICE SOTOMAYOR: If there were a history
21 here.

22 MR. CLEMENT: Sure, but, Justice Sotomayor,
23 I think -- I mean, there are sort of two portages that
24 are floating around in The Montello and I think it's
25 important to distinguish between the two. There is kind

1 of the classic overland portage between the Fox River
2 and the Wisconsin River.

3 JUSTICE SOTOMAYOR: There was a canal in
4 there, wasn't there?

5 MR. CLEMENT: Well, afterwards. But
6 originally that was an overland portage. And so that's
7 really not at issue. But that's kind of -- you know,
8 the classic portage I have in mind is an overland
9 portage.

10 Now, they are also talking about the extreme
11 efforts, and you could call them portages. I don't
12 think you need to, but there is also talk about the
13 extreme efforts to enable navigation on the Fox before
14 improvement.

15 But that's nothing like what's at issue here
16 because those were efforts basically to use the riverbed
17 to -- and they had to do some extraordinary things: get
18 an ox to pull the boat; lift them up over some rocks.
19 But they never really left the bed of the river there.
20 Where they left the bed of the river was the portage
21 over the Wisconsin.

22 JUSTICE SOTOMAYOR: But in The Montello,
23 they took the cargo off some boats --

24 MR. CLEMENT: Oh, absolutely.

25 JUSTICE SOTOMAYOR: --and moved it overland

1 to another spot before they put it back on the boat.

2 MR. CLEMENT: Sure, but my understanding of
3 what was going on there, and maybe I misunderstood it,
4 but I understand what they are talking about there is a
5 portage where you take the cargo out of the boat in
6 order to lighten the draft of the boat so it's not
7 sitting as deeply in the river, and that allows the
8 lighter boat to be carried over the --

9 JUSTICE SOTOMAYOR: We can both look at the
10 opinion, but I think there is one spot where the court
11 says that in some areas they had to change boats.

12 MR. CLEMENT: Well, and that may be, but, I
13 mean, again, I don't think we are talking about anything
14 like the distances that we are talking here, and also --

15 JUSTICE SOTOMAYOR: I don't disagree with
16 you, but what I'm asking is, if we had a history of
17 navigation of cargo that went to the beginning of one of
18 these rivers, and I'm not a sailor so my terms -- the
19 cargo is taken off and driven by wagon or some other
20 mode to another spot and picked up again. Is that a
21 different situation than one where that doesn't happen?
22 That because this length of portage is so long that it
23 is both economically and physically impossible to
24 transport cargo in that way. Is that a different case
25 for the question of navigability?

1 MR. CLEMENT: Well, sure, because these are
2 all matters of degree, and those would be two different
3 cases. But here's what I would point you to. Which is,
4 if -- at the point that you have to take the cargo off
5 of the boats, and then you then have to leave the
6 channel, you don't just do a little cut around some de
7 minis amount, but you leave the channel and go overland,
8 at that point, I think, that portage demonstrates the
9 non-navigability of the bypass stretch. And then I
10 think --

11 CHIEF JUSTICE ROBERTS: Even if it
12 demonstrates the non-navigability of the particular
13 stretch, but we would still speak of the transfer of
14 commerce as being along the river.

15 MR. CLEMENT: Well I don't --

16 CHIEF JUSTICE ROBERTS: The sort of the case
17 or analogy I was thinking of is if I say I fly from
18 Washington to Tokyo, and someone says, "No you didn't;
19 you flew to San Francisco, then you walked however many
20 yards from one gate to another, and then you flew to
21 Tokyo." And I'd say, "Well, yes, there is a gap there
22 when I walked -- part of the distance where I wasn't
23 flying," but people would still say you flew from D.C.
24 to Tokyo. Now why isn't this just like that, that the
25 commercial path, the commercial waterway people think of

1 as the Missouri. And yes, occasionally you have got to
2 get out, and, you know, we can debate how long the
3 portage is, but it doesn't it interrupt the notion that
4 that whole pathway would qualify as a navigable
5 waterway.

6 MR. CLEMENT: Two things, Mr. Chief Justice.
7 One is, I want to make clear that we very much dispute
8 factually that there ever was this kind of commercial
9 portage over the Great Falls. And there is really, you
10 know, there's very little evidence for the record. The
11 state's own evidence identifies Fort Benton 30 miles
12 below the Great Falls as the head of navigation on the
13 Missouri. So there is very much a factual issue here.

14 But to answer the legal question you are
15 asking, first of all, I am not sure I would have the
16 same instinct about common parlance if you had to go
17 from JFK to La Guardia in a cab. And I'm even less sure
18 that you would have the same notion if you had to drive
19 from San Francisco to LA to switch planes. And I think
20 the distance here really does matter. And I would
21 submit the way you think about this, the way I would
22 think about this is that the very need to bypass,
23 especially a substantial bypass where you leave the
24 river channel, is evidence that that part of the
25 channel, that part of the river is nonnavigable. And

1 then the question that is left is whether that is de
2 minimis.

3 JUSTICE ALITO: I don't see why portage is
4 relevant at all. What is the basis for the rule that
5 the sovereign owns the navigable rivers? I assume it's
6 because they are viewed, they were viewed as highways
7 for transportation and commerce. And to the extent that
8 there is an obstruction that cannot be traversed by a
9 boat, then there isn't going to be any commerce or
10 transportation along that area.

11 Now there might be an argument that the
12 sovereign should own the land next to the river so that
13 you could portage around it, but what, what would be the
14 justification for saying the sovereign owns the portion
15 of the river that can't be traversed at all by boat? I
16 just don't understand it.

17 MR. CLEMENT: Well, I'm with you on that,
18 Justice Alito, and I think logically if you think what's
19 the highway of commerce here, if there was this 18-mile
20 overland portage rout, that would be the highway of
21 commerce. But the 17-mile bypass stretch of the
22 Missouri and the Great Falls Reach would not be a
23 highway of commerce. And I think that gets back to the
24 expectations of the property owner that ultimately
25 underlie these title questions.

1 I mean, if you have boats going by a river
2 in your backyard, I mean, you have, you are on sort of
3 notice that you don't own the riverbed. But if you are
4 in a part of the river that is so unnavigable that it
5 has to be bypassed and you have never seen a boat in
6 your experience ever, then I think you have very
7 different expectations, and your expectations would be
8 the same as somebody --

9 JUSTICE SOTOMAYOR: 17 miles is very long.

10 MR. CLEMENT: It is.

11 JUSTICE SOTOMAYOR: I think the Thompson is
12 only 2.8 and that is really close to Montello where it
13 talked about, about two miles for some portage areas.

14 MR. CLEMENT: Well, with respect, can I take
15 both points. I mean, you are absolutely right.
16 17 miles have very long. I mean, for the New Yorkers,
17 you know, the East River is 16 miles long, the whole
18 river. The Anacostia River is 8 1/2 miles long. So this
19 bypass stretch --

20 JUSTICE SOTOMAYOR: But I'm not a
21 Midwesterner, and rivers of 200 miles are longer than --

22 MR. CLEMENT: Well, these -- this is still a
23 big stretch. And I do think that, like you said, longer
24 than some entire rivers. But the Thompson Falls, I
25 mean, the two miles of the Thompson Falls, I don't know

1 exactly where that number comes from. Its kind of an
2 artificiality. I mean, there -- Again, the State's own
3 evidence, look at J.A. 57 says that navigation stops at
4 Thompson Falls. There wasn't a portage around.

5 But the other point is I would ask you to
6 look at the 1910 court decree because as I said at the
7 outset, you know, these companies do just put these dams
8 up overnight as, you, kind of, as a lark. They went
9 through elaborate efforts to secure the property rights.
10 That's what generated the 1910 court decree about the
11 Clark's Fork River.

12 The Clark's Fork River court decree in 1910
13 addresses a stretch of rivers specifically that is just
14 the falls but the six miles of the reservoir that's
15 created. And the court holds that that entire region
16 and indeed the entire Clark fork in Sanders County is
17 nonnavigable. So the stretches that are nonnavigable
18 are and longer than two miles.

19 If I may reserve my time.

20 JUSTICE SCALIA: Thank you, counsel.

21 Mr. Kneedler.

22 ORAL ARGUMENT OF EDWIN S. KNEEDLER,

23 FOR UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING PETITIONER

25 MR. KNEEDLER: Mr. Chief Justice, and may it

1 please the Court:

2 The Montana Supreme Court committed three
3 basic errors with respect to all three rivers that
4 require a remand for further proceedings to actually
5 weigh and make factual findings concerning the evidence
6 of the relevant reaches of the river for purposes of
7 navigability for title. We are not talking about
8 navigability for interstate transportation or admiralty
9 or regulatory jurisdiction under the Rivers and Harbors
10 Act or the Clean Water Act. We are talking about
11 navigability for title.

12 JUSTICE KAGAN: And why does that make a
13 difference, Mr. Kneedler? Why do you think that there
14 are separate tests for title than for regulatory
15 authority?

16 MR. KNEEDLER: Well, in the Montello, for
17 example, the question was whether there was admiralty or
18 regulatory jurisdiction over the use of vessels on the
19 upper reaches of the river, and that depended in the
20 Court's view on whether that stretch was part of an
21 interstate or international highway of commerce. And so
22 it would make sense to look at the whole river in
23 determining whether it's a highway; and maybe in
24 deciding whether there is a highway, you would look to a
25 bypass stretch.

1 You would look at the highway, the land
2 highway to decide whether its useful in interstate
3 commerce. For title purposes, though, the question is
4 what happens to the stretch of the river right in front
5 of the riparian owner's land. As Mr. Clement said, that
6 reflects the expectations of the property owner, that if
7 there are no ships or boats going back and forth, that
8 that property is -- adheres to the riparian lands more.
9 I also think it -- it pertains to the control or use of
10 the beds of the rivers themselves.

11 CHIEF JUSTICE ROBERTS: I would think,
12 though, if you start drawing these lines, they become
13 very difficult, in some rivers anyway, to -- to apply.
14 I'm sure there are seasonable fluctuations. They may be
15 navigable in some seasons, but not in others. The line
16 at which you pass from navigability to non-navigability
17 may be difficult to ascertain.

18 It seems to me once you start chopping the
19 highway of commerce up, it does create all those
20 difficulties.

21 MR. KNEEDLER: Well, first of all, we're
22 not -- we're not talking about chopping the river up
23 into narrow slices. I mean, I think there has to be a
24 discernible and substantial segment of the river.
25 Often -- often, it will be self-evident from the geo --

1 topographical features of the area. Are there major
2 falls and rapids over an extended period of time?

3 But also, the points you're raising are -- I
4 think are inherent, because in deciding where
5 navigability stops under any test or in any
6 circumstance, you could have the difficulties that you
7 have described.

8 JUSTICE SOTOMAYOR: So what's de minimis?

9 MR. KNEEDLER: Well, I think --

10 JUSTICE SOTOMAYOR: Could 2.8 be de minimis
11 in one situation and not, and how do we tell --

12 MR. KNEEDLER: I -- I think it -- I think it
13 may well be. I think -- I think an important -- I agree
14 with the points that Mr. Clement made as guideposts. I
15 think another one -- and this pertains to --

16 JUSTICE SOTOMAYOR: If there's no falls but
17 there are riparian waters that don't permit navigability
18 over 2.8, than that's still navigable? I'm not sure --

19 MR. KNEEDLER: No, I think -- I think it has
20 to be -- I'm speaking of a situation where the river is
21 not navigable in fact. And that's the test, navigable
22 in fact, not navigable in law. If a -- if a boat cannot
23 pass in front of the riparian land, then that would be
24 non-navigable. I agree that --

25 JUSTICE SCALIA: And it shouldn't matter

1 whether it's 2.8 miles or 1 mile, right? I mean, if the
2 land is non-navigable -- if the river at that point is
3 non-navigable, it's non-navigable.

4 MR. KNEEDLER: For title purposes, yes.

5 JUSTICE SCALIA: And that's what we're
6 talking about, for title purposes. I don't see why
7 there -- there ought to be any de minimis exception.

8 MR. KNEEDLER: Well, I -- I think at some --
9 if you -- if you consider part of the -- part of what is
10 going on here is who controls the riverbed. I think it
11 would be unworkable to have a passage, a portion of a
12 river where you have 10-foot strips across the river
13 that are riparian owner-owned, and the State owned
14 everything else, or if you had stripes across a river.
15 So I think -- I think the test also --

16 JUSTICE KENNEDY: But how would the boat get
17 up there? Does it just jump over the 10 feet?

18 MR. KNEEDLER: Well, in The Montello, the --
19 there is evidence that the boat was lifted. The men got
20 out of the boat and lifted the boat up over the falls.

21 JUSTICE KENNEDY: Okay. Then that would
22 work.

23 MR. KNEEDLER: Pardon me?

24 JUSTICE KENNEDY: Then that would work.

25 MR. KNEEDLER: In that situation. But if

1 you have a long stretch of -- of river where that was
2 not practicable -- then you --

3 JUSTICE BREYER: You can't lift a boat over
4 Niagara Falls. And I -- and I read somewhere that --
5 and I hope I am wrong, but I have a feeling I read
6 somewhere that the land under Niagara Falls has long
7 been considered to be navigable, and therefore, it's
8 owned by the United States.

9 JUSTICE SCALIA: The international boundary.

10 MR. KNEEDLER: It's owned by the State.

11 JUSTICE BREYER: It's owned by the State. I
12 mean, the navigable -- I get mixed up in that.

13 MR. KNEEDLER: The reply brief I think --

14 JUSTICE BREYER: The navigable ones are
15 owned by the State. Okay. Everybody's thought the land
16 under Niagara Falls is owned by the State. Oh dear,
17 because that sort of wrecks our nice theory that all the
18 steps, all the little bits of it that are non -- that
19 are --

20 MR. KNEEDLER: That's not an -- I think
21 that's not an extended strip in the way that -- the way
22 that we're discussing here.

23 JUSTICE BREYER: Okay. Now we have to
24 define what's an extended strip.

25 MR. KNEEDLER: Well, if I --

1 JUSTICE SCALIA: I thought it's also an
2 international boundary --

3 MR. KNEEDLER: Yes.

4 JUSTICE SCALIA: As to which there is a
5 different rule.

6 MR. KNEEDLER: Yes, and the --

7 JUSTICE BREYER: Okay. So how much are we
8 wrecking if we just say, look, the bit that's
9 non-navigable is different from the bit that's
10 navigable, period? Doesn't matter if it's 5 -- 5 feet
11 of land or not. What -- what are we wrecking?

12 MR. KNEEDLER: I think it does matter
13 whether it's 5 feet, because the -- because an important
14 point here is that, who can make sensible use or control
15 the relevant stretch of the river. If it's 5 feet or 10
16 feet and you had strips that stayed private --

17 JUSTICE BREYER: A quick question that you
18 could probably answer just by saying: We decided not
19 to. But I was somewhat curious. It's really the United
20 States v. Montana in this, who owns the land, and it's a
21 question of Federal law. It's going to be highly
22 factual no matter what this happens. Made for this
23 Court's original jurisdiction. And -- and normally in
24 original jurisdiction, we appoint a master, it's worked
25 out, and we review the master's report.

1 We can't do that here because it's a case
2 about -- why didn't you go into, or why couldn't you go
3 into, a quiet title action at the lower court?

4 MR. KNEEDLER: We could, and we have not
5 given consideration to that, but that might be -- that
6 might be a possibility. The United States is not a
7 party to this case and couldn't be -- and couldn't be
8 bound by the judgment.

9 JUSTICE GINSBURG: Could it have intervened
10 somehow, because the -- the United States has come here
11 rather reluctantly, because you recommended against
12 granting cert in this case. When it was in the Montana
13 court and it was a question of what is the Federal law,
14 the Federal law is going to control. Everybody agrees
15 with that. Could the United States have come into the
16 proceedings in the Montana State court?

17 MR. KNEEDLER: Ordinarily, the United States
18 would not intervene in a State court proceeding, or if
19 it did it would remove the case to Federal court. So
20 that -- that would be -- that would be a -- an
21 additional consideration as to whether to get into this
22 suit. The United States would -- would typically bring
23 its own quiet title action in -- in Federal court.

24 CHIEF JUSTICE ROBERTS: Your -- your answer
25 a moment ago gives me pause. You -- you said the United

1 States would not be bound by this litigation, but could
2 bring its own quiet title action.

3 MR. KNEEDLER: Well, we would be bound by
4 this Court's decision, obviously. But I was just
5 speaking of the law of -- the law of judgments. And if
6 this Court remands back to the trial court with general
7 directions but doesn't adjudicate particular stretches
8 definitively, then, you know, I think we -- that's the
9 situation that we would -- that we would be in.

10 JUSTICE GINSBURG: And if we -- if it were
11 remanded, the United States would still stay out of it?

12 MR. KNEEDLER: I assume so. Obviously, that
13 would be a -- that would be a further consideration.

14 JUSTICE SOTOMAYOR: Am I to take that "de
15 minimis" to you means small enough so that they get the
16 boat physically over the portage, whether they carry it,
17 drag it?

18 MR. KNEEDLER: No. I think if they -- I
19 think if they can take it through the river, it's not an
20 interruption at all. But if -- if you have -- if you
21 have something that can't be transversed by a boat at
22 all and it's long enough that it could sensibly be
23 thought of as a -- as a separate parcel adhering to
24 the -- to the riparian land -- that would be --

25 JUSTICE SOTOMAYOR: Go back to carrying

1 their boat on their shoulders, which apparently in The
2 Montello they did. What's the answer --

3 MR. KNEEDLER: They didn't carry the boat
4 out of the river. These were Durham boats that were
5 70 feet long and -- and weighed quite a bit. Now, maybe
6 there were small canoes; that could have been done.
7 I -- I think a small portage. Again, I don't think it's
8 the length of the portage.

9 I think it's the interruption of the -- of
10 the navigable portion of the river that -- that is --
11 that is relevant. If it's large enough to constitute
12 a -- a sensible administrable parcel, that that should
13 be enough. I did want to take one moment to discuss the
14 Madison River because there, as Mr. Clement discussed,
15 the considerations are somewhat different.

16 First of all, the Court made a similar
17 mistake there by discussing the river as a whole, and
18 the log float in the middle stretch of the river, but
19 not focusing on the relevant stretches where the dams
20 are located. But it also put a lot of emphasis on
21 current recreational use by drift boats and what-not
22 without proper foundation to -- to determine whether
23 that was relevant for title purposes at Statehood,
24 because the relevant question is whether whatever boats
25 are used now are ones that would have been used as

1 custom -- this is the language from The Daniel Ball --
2 as "the customary modes of travel" -- "travel and
3 transportation at the" -- "at the time of statehood."

4 CHIEF JUSTICE ROBERTS: It's kind of odd.
5 Maybe this is -- maybe this is Justice Alito's earlier
6 question. It's kind of odd that the more navigable the
7 rich is, the more claim the State has. The less
8 navigable -- you're talking about sportsboats and drift
9 fishing -- then it's Federal.

10 MR. KNEEDLER: Well, that's -- that's a
11 product of the -- of the equal footing doctrine. And
12 the Court has long said that the State gets the beds of
13 navigable waters.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Garre.

16 ORAL ARGUMENT OF GREGORY G. GARRE

17 ON BEHALF OF THE RESPONDENT

18 MR. GARRE: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 This case is about who owns the riverbeds
21 underlying the rivers at issue. It's not about flood
22 lanes; it's about the riverbeds. And under this Court's
23 precedents, it's settled that title to the riverbeds is
24 conveyed to the State under the Constitution if they are
25 navigable.

1 It's been understood in Montana for more
2 than a century that these rivers are navigable. The
3 rivers were meandered as navigable. PPL's deeds -- and
4 this is at page 172 of the appendix to the opposition
5 brief -- specifically exclude the riverbeds. The test
6 for navigability that this Court has applied for
7 140 years, going back to The Montello and The Daniel
8 Ball, is whether the river served as a continuous
9 highway of commerce.

10 In The Montello, the Court recognized the
11 fact that few of the nation's great rivers did not
12 include some, quote, "serious interruptions to
13 uninterrupted navigation." And the -- and the Court's
14 answer to that geographic fact was not to say then let's
15 carve out the interruptions and say those aren't
16 navigable. The Court's answer was to say unbroken
17 navigation is not required to establish navigability.

18 JUSTICE SOTOMAYOR: Under your theory, if
19 there's a fall like this of 17 miles, and a train is
20 50 miles away and traverses that 17 miles, that portage
21 is good enough.

22 MR. GARRE: You have to show that the
23 commerce traveled along the river under the customary
24 modes of trade and travel.

25 JUSTICE SOTOMAYOR: Outside of your fur

1 traders and your gold miners, has that happened in any
2 other situation -- your alleged gold miners and fur
3 traders? Has that happened on -- on the -- in the Great
4 Falls?

5 MR. GARRE: If you take the Great Falls, the
6 history of portage from 1864 to 1868 was lively commerce
7 of millions of dollars, in today's value billions of
8 dollars of gold, from Helena to Fort Benton back east.
9 This is covered in detail by the Solicitor General's
10 brief that we've appended here.

11 JUSTICE SOTOMAYOR: Could you -- could you
12 do me a favor and you tell me again -- I am having real
13 trouble with the competing evidence in this case with
14 respect to every one of the three areas in dispute and I
15 have some serious questions about whether the court
16 properly granted summary judgment. Your brief seems to
17 suggest that I can't do -- we can't do anything about
18 that because it wasn't a part of the question presented.

19 MR. GARRE: I --

20 JUSTICE SOTOMAYOR: Your adversary says that
21 it's a fair question if we determine there is any legal
22 approach -- error in legal approach of the court below.
23 I'm assuming that also means on their weighing of
24 evidentiary matters. So why shouldn't we address the
25 summary judgment issue?

1 MR. GARRE: The question presented is
2 whether the Montana Supreme Court or whether a court --
3 a court -- what the constitutional test would be for a
4 court in this situation. It's not even limited to the
5 Montana Supreme Court here. It presents a legal
6 question.

7 With respect to summary judgment, the
8 problem for PPL is not that it didn't present enough
9 paper; the problem is it litigated the case under a
10 wrong legal theory. It litigated the case that the --
11 that the Missouri, for example, was not navigable
12 because you couldn't take a boat down the falls. This
13 Court's precedents for more than 140 years asked the
14 question of whether the river served as a continuous
15 highway of commerce. We presented evidence,
16 summarized --

17 JUSTICE SCALIA: For what purpose? Were
18 they -- were they -- were we answering the question for
19 the same purpose, or were we asking it for purposes of
20 whether Federal regulation could extend to the whole
21 river? For that purpose, it's easy to say if the whole
22 river is -- you know -- used for commerce, the Federal
23 Government can regulate even those portions of the river
24 that are non-navigable, that -- but that have to be
25 portaged around. But that's a different question from

1 who -- who owns title to the -- to the bed under the --
2 the portions that have to be portaged.

3 MR. GARRE: Your Honor, PPL recognizes that
4 The Daniel Ball supplies the test for navigability for
5 title. This Court recognized that in the Utah case, the
6 Vanguard title case that they hold out. So the only
7 question is did The Montello apply The Daniel Ball test
8 or did it apply something else? And the first paragraph
9 of the Court's decision in The Montello said it applied
10 The Daniel Ball test.

11 Courts -- this Court and lower courts for
12 more than a century have understood The Daniel Ball and
13 The Montello to supply the test for navigability of
14 title. What they are asking this Court to do is upend
15 more than 140 years of precedent and the amicus brief
16 filed by the States in this case gives -- gives the
17 Court a sense of the disruption that this would cause.

18 JUSTICE ALITO: What -- what do you
19 understand to be the reason for the rule that the States
20 own the navigable rivers?

21 MR. GARRE: The reason for the rule was the
22 public trust doctrine which -- which sought to keep
23 these rivers free for the public to use for navigation,
24 for fishing and for other uses; and this court's
25 precedents --

1 JUSTICE ALITO: What do fishing and
2 navigation have to do -- for -- what does fishing have
3 to do with navigability?

4 MR. GARRE: Well, it gets back to the -- the
5 public trust doctrine, Your Honor. Fishing doesn't
6 have -- fishing is a purpose of the public trust
7 doctrine, which is why it was understood --

8 JUSTICE ALITO: Let me put it this way.
9 Why -- why should -- why does the State own a navigable
10 river but not a non-navigable river?

11 MR. GARRE: Because the navigable rivers
12 were the arteries of commerce in this country, and at
13 the time of the founding it was understood -- and this
14 gets to the core issue of federalism in this case --
15 that the States ought to be the ones that control the
16 navigable rivers, not the Federal Government.

17 JUSTICE ALITO: Yes, and if that's the
18 reason -- if that's the reason for the rule, than what
19 is the justification for State ownership of a portion of
20 the river that is not navigable?

21 MR. GARRE: I think this gets back to the
22 question of whether you can just chop up the rivers into
23 navigable and nonnavigable bits. And we are talking --
24 this Court, Justice O'Connor observed in her dissent in
25 the Phillips Petroleum case that navigability wasn't

1 decided inch by inch. What the other side is asking you
2 to adopt here is a test of navigability that's at least
3 by mile by mile, if not acre by acre, which is
4 completely different than this Court has ever assessed
5 navigability.

6 JUSTICE ALITO: The rule that you are
7 arguing for might be an established rule that we should
8 follow, but as a matter of theory I don't understand
9 what the justification is for State ownership of a
10 non-navigable portion of the river if the reason for the
11 underlying rule is so that people will not put up
12 obstructions on the river so that they -- it can be
13 maintained as an -- as an avenue of commerce. I can see
14 that you -- why the State would own that, because
15 otherwise riparian owners could put up fences and
16 obstructions and charge tolls and -- and that sort of
17 thing; but if it's not navigable I don't see what it has
18 to do with -- with commerce or transportation.

19 MR. GARRE: What -- what the Framers were
20 concerned about and this is also reflected in the
21 Northwest Ordinance 2, was ensuring that the navigable
22 waters, the major arteries of commerce in this country,
23 remained open. And so they -- they applied a much
24 more -- much broader conception of navigability than
25 as --

1 JUSTICE SCALIA: But -- but they are closed
2 where they are -- they're impassable for ships anyway.
3 They're closed. What do you mean, remain open?

4 MR. GARRE: And so that was the argument --

5 JUSTICE SCALIA: You've -- you've got falls.
6 You've got waterfalls, you got rapids. What does it
7 mean to be sure that that river remains open to
8 commerce? Commerce is impossible over it.

9 MR. GARRE: And so that was the argument
10 that the district court adopted in The Montello case,
11 and this Court emphatically rejected it. And by the
12 way, the portage in The Montello case was 5 miles long.
13 That's reflected in the -- the record in that case
14 before this Court.

15 JUSTICE GINSBURG: Mr. Garre, what is -- you
16 say that you are not taking just -- you look at the
17 whole river as a whole. You are saying no, that isn't
18 the position?

19 MR. GARRE: No, it's not.

20 JUSTICE GINSBURG: And that it's also not
21 inch by inch. So what -- when is segmentation
22 appropriate?

23 MR. GARRE: I think the relevant stretch or
24 segmentation is really a litigation term. Our position
25 is this Court's test: continuous highway of commerce.

1 You would take the part of the river at issue in a case,
2 take that part and look -- ask the question, was that
3 part of a continuous highway of commerce or not?

4 So if you found yourself in Cataract Canyon
5 in the Utah case, you would ask yourself that question,
6 and you would say, no, this was not part of a continuous
7 highway of commerce because no one argued either that
8 the canyon was portaged or that goods was traveling down
9 the Colorado River through the canyon and out into
10 Arizona.

11 If you ask yourself that question in this
12 case along the Great Falls, you would say yes, because
13 the evidence was unrebutted that millions of dollars of
14 gold was traveled up from Helena to Fort Benton along
15 the -- the Missouri River with the aid of a portage, and
16 that that was unquestionably a highway of commerce.

17 What they are asking this Court to do is
18 chop rivers up into navigable and nonnavigable pieces.
19 How would that impact the public trust doctrine? The --
20 the brief filed by the National --

21 JUSTICE GINSBURG: So you just -- so you are
22 disagreeing with the United States, which has given us
23 its view of what the Federal law is. It doesn't
24 coincide with Montana's.

25 MR. GARRE: The United States has sided

1 completely with Montana. The answer it gives for what
2 is a short interruption in its brief is an interruption
3 that doesn't warrant separate consideration. That's on
4 page 17 of its brief. That's the epitome of a circular
5 test, and --

6 JUSTICE BREYER: Just out of -- I mean, to
7 waste your time for a second. Why do the feds own the
8 land underneath the -- and why -- under the nonnavigable
9 part? Why -- why do the feds own -- own the land
10 under -- under nonnavigable streams?

11 MR. GARRE: I think if you -- if you applied
12 the proper test here you would conclude that the
13 river --

14 JUSTICE BREYER: I mean, a little creek
15 somewhere which you'd think, gee, those belong to the
16 State, but it turns out the feds own the land underneath
17 the little creek; is that right?

18 MR. GARRE: I think what -- the nonnavigable
19 parts --

20 JUSTICE BREYER: Yes.

21 MR. GARRE: -- didn't transfer under the
22 equal footing doctrine. Oftentimes those were subject
23 to separate conveyances, so they might come into private
24 property. I think --

25 JUSTICE BREYER: I see. So the rule is on

1 the non-navigable streams it depends on what the
2 conveyance was at the time of statehood, and those are
3 individual matters, and sometimes you see the feds own
4 them and sometimes the States.

5 MR. GARRE: And what was --

6 JUSTICE BREYER: Is that right?

7 MR. GARRE: Yes, I think that's right.

8 JUSTICE BREYER: Okay.

9 MR. GARRE: And what was critically
10 important to the -- to the Framers was that the States
11 would have control over the navigable waterways. This
12 Court has described that as an essential attribute of
13 State sovereignty.

14 CHIEF JUSTICE ROBERTS: But we are talking
15 about the land at the bottom of the -- the river. What
16 is it that the State can't do on the navigable waterways
17 that it wants to do?

18 MR. GARRE: Well, owner -- ownership --
19 along with ownership goes the right to control whether
20 facilities can be built on them, bridges or pipelines;
21 it goes -- along with that goes the rights to mineral
22 leases --

23 JUSTICE KENNEDY: But as the Chief Justice
24 is indicating, I think, this concerns who owns the bed;
25 and that is different from navigable waters of the

1 United States.

2 And -- and some of the answers you gave to
3 Justice Alito about the purposes and the reasons for
4 navigable waters of the United States are quite
5 different, really, than for the considerations we have
6 about riparian ownership. The navigable waters of the
7 United States can be controlled by the United States for
8 many purposes, but that is concurrent with a separate
9 document -- doctrine for underlying ownership of the
10 bed.

11 MR. GARRE: Right.

12 JUSTICE KENNEDY: And it's not clear to me
13 that the test for navigable waters is the same in each
14 case as to the whole river.

15 MR. GARRE: Well, I think that the test that
16 we are articulating is The Daniel Ball and Montello
17 Test -- continuous highway test. I think with respect
18 to the riverbeds, it's always been understood that with
19 controlled riverbeds, along navigable waters, States
20 have a right to control fishing, navigation and other
21 aspects.

22 JUSTICE BREYER: But, now, Montello was a
23 case -- to follow up this same question. Montello, I
24 take it was not a title case. Montello was a regulation
25 of the stream case. So I can understand perfectly well

1 why that language in Montello applies for the reason
2 Justice Kennedy just said. Now, I grant you that in
3 later title cases this Court has taken the same words
4 and written them. But is there an instance in the later
5 title cases where that language has played a controlling
6 role?

7 MR. GARRE: Well, the --

8 JUSTICE BREYER: What case should I look at
9 to see -- was really meant that this -- to start with
10 where Justice Scalia was and say what Justice Kennedy
11 just said and then thinking well, I'm thinking well
12 Montello is a case that involved a different purpose and
13 now the later cases, although they quoted the language,
14 it didn't have a role. Am I right or not?

15 MR. GARRE: This case has recognized always
16 that The Daniel Ball and the Montello is the test for
17 navigability for title as well as admiralty. It has
18 never drawn the kind of distinction that PPL and the
19 United States has asked be drawn here.

20 JUSTICE SCALIA: The question is has it held
21 that. Do you have a case where it would have made a
22 difference?

23 MR. GARRE: Not of this Court. The lower
24 courts --

25 JUSTICE SCALIA: Okay.

1 MR. GARRE: -- have relied upon The Daniel
2 Ball and Montello in plenty of circumstances
3 adjudicating a title. I think the Court has to think
4 about what the world would look like if the Court
5 adopted PPL United States --

6 JUSTICE SCALIA: If this is such an
7 understood and traditional rule, why didn't Montana make
8 its rights known earlier when these private owners
9 bought the land? Indeed the State gave them
10 condemnation power to flood adjacent lands so that they
11 could build their dams. And you say while all this was
12 going on, well of course everybody knew that Montana
13 owned this land.

14 Now they come back what, 100 years later and
15 they not only want to get the land back, they want to
16 tax them for their use of it over all these 100 years?
17 That's extraordinary.

18 MR. GARRE: PPL's deeds, Your Honor, PPL's
19 deeds exclusively exclude the riverbeds at issue in this
20 case. So PPL can have no claim to those lands, and in
21 fact in its supplemental brief says that the United
22 States owns the lands. We are not talking about the
23 flood lands here, we are talking about between the low
24 water marks. Those lands were surveyed and meandered at
25 statehood to show that they did not convey to private

1 parties.

2 Montana courts have recognized for more than
3 a century that these waters are not navigable.
4 Everybody understood that they were -- navigable. The
5 reason why this issue only arises now is because of a
6 1999 decision of the Montana Supreme Court that said
7 that the State, made clear that the State had a
8 fiduciary obligation to seek compensation for the use of
9 the riverbeds. So that then teed up the question of
10 whether the State could actually charge rent for the
11 riverbeds. The State in this case --

12 JUSTICE KAGAN: And what about other land
13 owners on the riverbeds. If Montana wins this case will
14 they be paying rent as well?

15 MR. GARRE: They are not using the
16 riverbeds, Your Honor. The reason why the facilities
17 here are using the riverbeds is because they actually
18 sit on it. There are other instances where private land
19 owners have easements and leases, like mineral leases
20 with the State, under the -- because of the accepted
21 understanding that the State does own those lands. And
22 this is not at all unusual.

23 If you look at the State's brief, Washington
24 and Oregon have thousands of these types of permits
25 because it is established that if the water is navigable

1 than the State owns the riverbeds and there are
 2 consequences that flow over this. But this really isn't
 3 a fight between the State and the private land owners.
 4 It's a fight between the State and the United States.
 5 Because if this case --

6 JUSTICE KAGAN: I guess if I could
 7 understand then. You think that this is a one of a kind
 8 landowner. There are no other land owners in Montana
 9 who are in this situation of PPL?

10 MR. GARRE: No, I think there are other land
 11 owners who have asserted -- who want rights to get
 12 minerals along rivers or have peers or bridges, and in
 13 those situations they get permits from the State to use
 14 it. But I think what's going to happen is if this Court
 15 declares that every mile or so that is in interruption
 16 is nonnavigable, then title is going to transfer to the
 17 United States because under this Court's precedent in
 18 Utah, the Court held that if waters were not navigable
 19 the United States would have --

20 JUSTICE SOTOMAYOR: Is there a mile stretch
 21 anywhere on this river.

22 MR. GARRE: A mile stretch?

23 JUSTICE SOTOMAYOR: Yes. Is there a mile
 24 stretch in which the boats stop? Some water in the
 25 middle --

1 MR. GARRE: The two areas at issue here is
2 the Great Falls stretch --

3 JUSTICE SOTOMAYOR: I know the two at issue.
4 But you're saying if we rule the way we do, we are going
5 to slice it up and so does the Attorney -- the Solicitor
6 General's office say, we are going to slice it up half
7 mile or half acre by half acre. I am not sure how that
8 happens. I go back to Justice Kennedy's question, which
9 is does a boat stop mid stream?

10 MR. GARRE: So the test would be any non-de
11 minimis interruption, that's the one that PPL and the
12 United States are urging here. There are thousands of
13 dams in the country. There is Niagara Falls which for
14 more than a century its been understood that the State
15 owns it, not because its an international boundary,
16 that's a line plucked out of the decision. Read the
17 decision and --

18 JUSTICE BREYER: All right. So how do I
19 find that out. If I start with a practical premise of
20 not wanting to interrupt expectations. I also believe
21 that it's the most common thing in the world for
22 electric power companies to put hydroelectric facilities
23 where there are water falls or rapids and that's true
24 all over the country. So what's the status quo with
25 the -- you know, somebody could count up how many

1 hydroelectric plants there are on water falls and what's
2 the general view?

3 Are those hydroelectric companies been
4 thinking that they are leasing or buying from the feds
5 or from the States? I mean, I don't know what's
6 happened in the past. And I looked at the briefs and I
7 can't get a very good picture.

8 MR. GARRE: The best evidence I think we
9 have about this question of the implications comes from
10 the brief filed by 26 States, which explains that if
11 this Court adopts the kind of segmentation approach, any
12 interruption that is not de minimis has to be carved out
13 it's going to wreak havoc in States across the country
14 especially, in the western States. Again, getting --

15 JUSTICE BREYER: When you say wreak havoc,
16 you mean to say that the States have leased those strips
17 with the water falls which are impassable to
18 hydroelectric companies and the leases will have to be
19 renegotiated or something like that?

20 MR. GARRE: I'm not referring to specific
21 leases on that. I'm talking about things like public
22 access for fishing, for example. The State decided that
23 the Steelheader case in Oregon, and this is what's going
24 to happen, either the public -- private landowners are
25 going to claim people coming along my banks to fish,

1 they don't have access to these waters. If they were
2 navigable -- understood as navigable waters owned by the
3 State, it's clear that they had would have access.

4 There is going to be clashes, there's going to be --

5 JUSTICE SCALIA: Well, I thought you say it
6 doesn't belong to the private individuals. I thought
7 you said it belongs to the United States if it doesn't
8 belong to the --

9 MR. GARRE: What this Court has said is if
10 it's not navigable, the United States has it. The
11 question of --

12 JUSTICE SCALIA: They are. And you think
13 the United States is going to keep off these fishermen.

14 MR. GARRE: The question is whether there
15 would be a separate conveyance from the United States.
16 There is certainly going to be plenty of private
17 landowners, I think, who are going to claim private
18 ownership. So there is going to be some sorting out to
19 do.

20 JUSTICE SCALIA: But you think they are
21 wrong, right?

22 MR. GARRE: Well, no. If the river is not
23 navigable, then the land didn't convey under equal
24 footing doctrine. There would be a separate question of
25 whether they conveyed by some other Federal patent, land

1 patent, or the like. And there are certainly --
2 certainly are plenty of those. But I think what is
3 clearer is --

4 JUSTICE GINSBURG: Mr. Garre, you said, this
5 is genuinely a controversy between the States and the
6 United States, but the United States is not a party to
7 this litigation. And we know from the briefing before
8 us, the United States takes a different position than
9 Montana, it doesn't agree with you. But if this case --
10 how can a case be decided without any input from the
11 United States when you say that's the true dispute is
12 between the States and the nation?

13 MR. GARRE: Well, the United States is here.
14 It's given its views. It's true that it didn't
15 participant below and it is a little bit unusual.
16 What's weird is that the United States has never
17 actually asserted ownership to the riverbeds in this
18 case. But I think --

19 JUSTICE KAGAN: Does PPL pay rent to the
20 United States.

21 MR. GARRE: Not with respect to the
22 riverbeds. There is a statement in the brief that
23 suggest that they pay rent. That's with respect to the
24 upland, the flooded lands, for example, along the
25 reservoir. The United States has never charged rent for

1 the use of the riverbeds themselves between the low
2 water marks.

3 JUSTICE KENNEDY: Would you help me with
4 this? Navigable waters of the United States for
5 purposes of Federal jurisdiction over many activities
6 such as boating is one concept. Navigable waters of the
7 United States for purposes of State ownership of the bed
8 serves different purposes.

9 Are the -- are the boundaries and the
10 definitions of what is navigable co-ex-extensive and
11 parallel and precisely the same in each case? Or, on
12 the other hand, are there some cases where a body of
13 water, say the falls, is navigable waters of the United
14 States but not navigable waters of the United States for
15 purposes of bed ownership by the State?

16 MR. GARRE: There certainly --

17 JUSTICE KENNEDY: And, and if there is a
18 difference, can you tell me a case? And I think
19 Justice Scalia basically was asking this earlier.

20 MR. GARRE: There are two -- well, there is
21 three distinctions between the test for title and the
22 test for regulatory purposes.

23 JUSTICE KENNEDY: Yes.

24 MR. GARRE: None of which bear on the
25 dispute in this case. One is for title. You look at

1 the time of statehood. You don't look at the river at a
2 later time. The next is, is that for purposes of title,
3 you look at the river in its natural state. You don't
4 look at improvements. And the third is, for purposes of
5 title, kind of commerce you consider is actually more
6 expansive in the type you could consider for regulatory
7 purposes.

8 This case, the focus has been on the rivers
9 at the time of statehood, their use as highways of
10 commerce without improvements, which is in the heartland
11 of the test for navigability under The Daniel Ball and
12 the Montello.

13 None of the distinctions that this Court has
14 ever recognized would bear on this, nor would it make
15 any sense, I think, to say that the rule that we
16 identified in the Montello that has, for more than a
17 century has been established as the test for title for
18 navigability somehow has to be applied differently in
19 this case in a way that would require breaking up the
20 rivers. And I think --

21 JUSTICE KENNEDY: But it is conceded, is it
22 not, that with -- if we rule for the power companies in
23 this case, there still may be a situations in which
24 these waters can be navigable waters of the United
25 States for other purposes other than ownership of the

1 bed. Or am I wrong on that?

2 MR. GARRE: No, I think the United States'
3 position is, say they are navigable for Federal purposes
4 but not for State purposes. And I think -- and they
5 have taken what I think is a pretty remarkable position.

6 If we look at the brief that we have
7 appended to our brief, the United States in the Montana
8 Power Company case, the United States is saying, the
9 very same stretch of the Missouri along the Great Falls
10 is navigable because it serves as a continuous highway
11 of commerce and the falls did not prevent the river from
12 being used as a continuous highway and, therefore, it's
13 navigable under the Montello and The Daniel Ball, which
14 is the theory that they recognize.

15 And now they are here saying, well, that was
16 only for regulatory purposes and not for title purposes.
17 But it's the same test in both cases, and that's the
18 test that the nation has understood for more than
19 150 years.

20 CHIEF JUSTICE ROBERTS: No, but I'm not sure
21 it has the same consequences. It seems to me that
22 regardless of who prevails in this case, the State will
23 be able to exercise regulatory jurisdiction over the
24 waters. You know, you can't fish during these seasons,
25 or there are different limits on how many fish you can

1 take. And so will the Federal government. It will be
2 able to apply Federal law to the river regardless of who
3 owns parts of the river, regardless of who owns the land
4 underneath.

5 MR. GARRE: And so this Court has always
6 recognized the State's authority to make those decisions
7 as an essential attribute of their sovereignty. And
8 that's why the State's --

9 CHIEF JUSTICE ROBERTS: Without regard --
10 But I would say without regard to whether they happened
11 to own the land under the river or not.

12 MR. GARRE: No, when they own the land under
13 the river, that -- the ability to control access along
14 those rivers and fishing and the like is an essential
15 attribute of State sovereignty. So just saying that,
16 well, the Federal government and State government can
17 regulate together is, I think, an important intrusion on
18 State sovereignty as this Court has always understood
19 under the Equal Footing Doctrine and the Public Trust
20 Doctrine.

21 And you also have the problem of competing
22 regulation of these rivers when you go from mile to
23 mile, interruption to interruption, potentially
24 thousands along rivers. And that's laid out in the
25 brief by the environmental groups here, the National

1 Wildlife Foundation, Tribal Unlimited and other groups
2 that talk about the problems with fragmented regulatory
3 jurisdiction.

4 And you also get into the question of public
5 access for fishing, too. The rivers are used for
6 commerce, but the Public Trust Doctrine was always used
7 to protect access to rivers for fishing, too. And so if
8 you look at a place like the Great Falls or the Thompson
9 Falls, these are among the most sought after fishing
10 rivers in the world.

11 JUSTICE SCALIA: You are willing to concede
12 on behalf of the State that if we find that the State
13 does not have ownership of the bed, the State does not
14 have regulatory jurisdiction for all of these purposes
15 that you were now describing?

16 MR. GARRE: Absolutely not, Justice Scalia.

17 JUSTICE SCALIA: Well, then your argument
18 doesn't carry much weight. The State can continue to
19 regulate all those things whether or not it owns the
20 bed.

21 MR. GARRE: And so every time this Court has
22 said that the ability to do that is an essential
23 attribute of sovereignty, it must not have meant it
24 because the United States could do it, too. I mean, it
25 is important to the states because having the sovereign

1 capacity over those riverbeds as navigable waters under
2 the Public Trust Doctrine is critical to the State's
3 authority.

4 JUSTICE SCALIA: Well, you have sovereignty
5 over the land owned, owned by other private persons.

6 MR. GARRE: And I think it gets back to the
7 Public Trust Doctrine, the Equal Footing Doctrine, what
8 this Court has said in the Utah case and other cases
9 about the role of states in regulating navigable rivers
10 and owning title to the river beds underlying those
11 rivers.

12 CHIEF JUSTICE ROBERTS: We haven't talked
13 much about the Madison. What is your best piece of
14 evidence with respect to the Madison for the proposition
15 that it was navigable at statehood?

16 MR. GARRE: Well, there was some evidence of
17 use by fur trappers and the like. It was not extensive
18 because this area was relatively sparse.

19 CHIEF JUSTICE ROBERTS: Well, fur trappers
20 are going to go -- they don't need a lot of water to ply
21 their canoes up the river.

22 MR. GARRE: Well, and this Court has
23 recognized that things like pirogues and bateaux were
24 sufficient to establish the continuous highway of
25 commerce.

1 I think the point on the Madison is the
2 susceptibility for use as a navigable river. And the
3 main point that we made below is that where their own
4 expert had recognized that PPL's dams had impeded the
5 flow of water over of the river, that if those dams
6 impede the flow of water of the river but yet today
7 there are thousands of drift boats similar to the boats
8 that would have used it at the time of statehood, then
9 it is good evidence that it was susceptible for use.

10 But I think the Madison is in a different
11 category than the Missouri and the Clark Fork.

12 I do want to answer the question about the
13 17 miles. The Des Plaines River in the Economy Light
14 case, there was an 18-mile portage. That's made clear
15 at page 18 A of our addendum where the government
16 recognized that. In -- Montello it was a five-mile
17 portage. And there are other examples of portages.

18 JUSTICE SOTOMAYOR: Counsel, was that the
19 canal -- what subsequently became the canal area.

20 MR. GARRE: I -- I think that's right. It's
21 in the testimony in that decision. But certainly
22 17 miles -- and the other thing is that in the amicus
23 brief, on page 27 of the Tubbs brief, she suggests that
24 the actual portage before Statehood was only 8 miles. I
25 don't think you can draw a constitutional line between

1 5, 7, or even 10 miles and 17 miles.

2 We think the line the Constitution draws is
3 whether -- asks whether the river was served as a
4 continuous highway of commerce, notwithstanding any
5 interruption along that way.

6 JUSTICE SOTOMAYOR: I think that then the
7 simplest rule is, is the river from shore to opposite
8 shore -- any portion of it -- did boats traverse it.
9 That would be I think what Justice Alito was asking.

10 MR. GARRE: But that's not even a rule that
11 PPL was asking for, because they acknowledge that some
12 interruptions would be navigable. They call it "non-de
13 minimis." It's not clear how you get there.

14 If you go between the low watermarks,
15 there's only a part of the way that you could actually
16 bring a boat up, but yet it's established that the State
17 owns the entire riverbeds between low watermark to low
18 watermark.

19 After traversing the Missouri and the very
20 falls at issue in this case, Meriwether Lewis described
21 it as "he didn't think the world could furnish a finer
22 example of a navigable river through a mountainous
23 country than the Missouri." That assessment made by the
24 President's own agent, charged with assessing the
25 suitability of the Missouri for commerce, was consistent

1 with more than 140 years of this precedent --

2 JUSTICE KENNEDY: Did he write that during
3 his 30-day -- 32-day portage?

4 (Laughter.)

5 MR. GARRE: Your Honor, it was an 11-day
6 portage. At the time of Statehood, it was a one-day
7 portage. I think what's significant is he wrote it
8 after that portage. And yet he recognized that there
9 was not a finer example of a navigable river through a
10 mountainous country. That assessment is consistent with
11 this Court's precedents for more than 140 years. It's
12 consistent with the actual use of the Missouri as a
13 continuous highway of commerce along the very stretch at
14 issue here.

15 We don't believe that PPL or the United
16 States has -- has provided a legal reason for this Court
17 to overturn the judgment of the Montana Supreme Court
18 that the Missouri or the other rivers at issue in this
19 case are navigable.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Clement, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE PETITIONER

24 MR. CLEMENT: Thank you, Mr. Chief Justice.

25 A few points in rebuttal.

1 First, it's --

2 JUSTICE SOTOMAYOR: Portages that are de
3 minimis. Point me -- I don't care where they are in the
4 United States -- give me a list of some that are de
5 minimis.

6 MR. CLEMENT: I mean, I don't have any de
7 minimis portages for you. The portages he's talking
8 about, as far as I can tell, the 5-mile and 8-mile are
9 portages between rivers, and that has nothing to do with
10 whether the bypassed stretch of the river would be
11 non-navigable because it's de minimis, because if you
12 portage between two rivers, you're not bypassing
13 anything.

14 Where I can talk about sort of portages
15 being de minimis, if you look at the special master's
16 report in the Utah case, there are a few places in the
17 Cataract Canyon where he talks about portages, and he
18 talks -- you know, in parts where they got boats to.
19 But the -- the key point is, whenever the Court has
20 talked about portages in the context of navigability,
21 they've pointed to them as suggesting non-navigability.

22 And in certain circumstances, well, you had
23 to portage a little bit, but that's not enough to make
24 the stretch non-navigable.

25 JUSTICE KENNEDY: And what were your -- what

1 were your other four points you were going to give us?

2 MR. CLEMENT: Well, I've given you a couple,
3 Your Honor. I'd start with the deeds. You know, the --
4 the State wants to make something of the fact that the
5 deeds stop at the river. But that's true throughout the
6 State. And the question then becomes what rule governs
7 the ownership of the riverbeds? And that's where
8 navigability versus non-navigability. So the deeds
9 don't prove anything. That's just the way the deeds
10 were written.

11 The next point: Justice Kagan, you asked
12 about, you know, did the other owner -- other people on
13 the river have anything to fear. And the answer as far
14 as I heard was, well, these are different. They sit on
15 the riverbed. Well, two things, Your Honor: so do some
16 of the peers. And that's why people have filed amicus
17 briefs and are very concerned.

18 But more to the point, these things have not
19 moved under the riverbed recently. They've been sitting
20 there for 100 years, and the State lent its eminent
21 domain power to us to help us build these dams. These
22 dams were critical to developing energy and development
23 in this area. And now 100 years later, they want
24 compensation for the little river strip --

25 JUSTICE SCALIA: Could the United States

1 demand compensation?

2 MR. CLEMENT: We pay the United States
3 compensation right now. The difference is, the United
4 States isn't going in afterwards and trying to put a
5 hold-up to us and saying it wants \$50 million for this.
6 We pay rents to FERC for some of these lands. Actually,
7 the State gets 37.5 percent of the --

8 JUSTICE SCALIA: For the riverbed? For the
9 riverbed land?

10 MR. CLEMENT: Well, look at footnote 3 of
11 the government's brief. I mean, again, the problem here
12 is if you want people to have deeds that really are --
13 parse out whether it's riverbed or upland, they don't
14 because everybody defaults to the bottom line -- the
15 background rule. The background rule is if it's a
16 non-navigable river, the riparian owners, whether it be
17 the United States or private property owners, get to
18 midway, or if they own both on both sides, they get the
19 whole thing.

20 I think on de minimis, we've talked about it
21 a lot. But I would point out that the one thing we know
22 that is not de minimis from Utah is 4.35 miles. Because
23 that's what the Court analyzed separately in the portion
24 of Cataract Canyon.

25 Every stretch at issue here, every dam at

1 issue here, is more than 4.35 miles. Fully five of the
2 dams are on the 17-mile Great Falls stretch, which they
3 agree is impassable. The other five are reservoir dams
4 that create reservoirs that extend over 4.35 miles.

5 There's nothing de minimis in the best
6 evidence that is the \$50 million in compensation. I
7 think the \$50 million in background also shows that
8 although this is a dispute between Montana and the
9 United States, my client is caught in the middle of it,
10 and they are obviously concerned about it, too.

11 I want to talk about what's disputed and
12 what's undisputed. What is undisputed is the 17 miles
13 is impassable. That's enough, as I say, to give us
14 judgment as a matter of law for the five dams on that
15 stretch. What is hotly disputed, despite my friend's
16 representation, is whether or not there was through
17 commerce through this bypass route. He suggests it's
18 undisputed that gold went from Helena down to Fort
19 Benton down to St. Louis. And that of course is not
20 disputed. But it went on roads. It didn't go on the
21 upper Missouri.

22 And if you want to know who's got the better
23 of this argument, I ask you to think about this
24 question: the United States Army built a 600-mile
25 overland road from Fort Benton, the traditional head of

1 navigation on the Missouri, to Walla Walla, Washington.
2 Now, if the State is right and the upper Missouri and
3 the Clark Fork were navigable, all they had to do was
4 have a 60-mile road to connect the two.

5 They were never navigable.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Thank you, counsel.

9 The case is now submitted.

10 (Whereupon, at 12:09 p.m., the case in the
11 above-entitled matter was submitted.)

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